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ENTERPRISE CORPORATISM

**New Industrial Policy and
the "Essence" of the Legal Person**

by

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Enterprise Corporatism

New Industrial Policy and the "Essence" of the Legal Person

I.

The legal person has become an inert person indeed. While in the 19th Century it was a fiery fighter for political and economic freedoms against government regulation and concession systems, today it is no longer trusted with any role in major economic policy controversies. What can the legal person, of all persons, possibly contribute to current issues such as the "new industrial divide", the European choice between "Americanization" and "Japanization", the strategies of new flexibility and the "management of uncertainty" (1)? The search for the "essence" of the legal person, which has fascinated whole generations of lawyers, has now been tacitly abandoned due to an everyday familiarity with this legal entity. Today the legal person is having to pay the price of success: nobody is interested in its essence any longer, and, despite warnings to the contrary, it is no longer taken seriously, not even when the issue involved is the famous "piercing of the corporate veil" that so inflames the legal imagination (2).

To be sure, there have been some recent attempts to rediscover the political dimensions of the legal person (3). In an impressive reinterpretation, for instance, Claus Ott has described the old dispute over the "essence" of the legal person as a political conflict over the function and legitimation of intermediary forces in society, raising the question of its political legitimation under present-day conditions. But while a pluralist concept of corporate governance did emerge from Ott's analysis, it made no contribution to the theory of the legal person (4). And no wonder, for if Ott proposes to solve the corporate person's legitimation problems by establishing links to interest groups and regional parliaments, then the real achievement of the legal person - namely to increase organizational autonomy - has to take second place.

In order to rediscover the social dimension of the legal person, it would seem advisable to completely invert the approach adopted. It is not a limitation of organizational autonomy that is needed, but a heightening of it. If the legitimation of the firm is sought primarily not in the consent of those involved, but in its overall social function and performance (5), then the heightening of organizational autonomy vis-à-vis the persons and interest groups involved is not only compatible with this legitimation, but indeed its precondition. We can then start to see what the good old legal person might be able to contribute to industry policy. Industry policy might be able to find a viable alternative to the current strategies of

contractual flexibilization in the heightened autonomy of an action system which is independent vis-à-vis the groups involved and which is capable of reacting sensitively, in autonomous goal-seeking, to the demands of, threats to, and changes in the environment (6). To achieve such flexibilization through organization (7), however, it is necessary, in the interests of society as a whole, of course, to strengthen the "corporate actor" - a new-fangled term for the legal person - and its autonomy vis-à-vis the internal interest groups involved. This turns the current logic of legitimation entirely on its head. It is not pluralism within the firm that justifies the actions of the corporate actor, but the contrary: internal pluralism is legitimate only insofar as it is oriented towards the corporate actor's goals, which in turn must be legitimized by the firm's function and performance in society.

To give such preeminence to the collective identity of organizations is certainly problematic today (8). With the spread of economic models adhering strictly to methodological individualism, collective actors have fallen into disrepute. The firm is dissolved into a network of contracts among the individuals involved, or into a "transactional network" in which, while a "central agent" does appear as a natural person, the legal person either does not feature at all, or does so only as a bizarre fiction of jurists (9). Even sociologists, who by the nature of their discipline ought to develop a feeling for the reality of the collectivity, analyse the corporate actor

out of existence by conceptualizing it as resource pooling by individuals (10). Those who assert the social reality of collective units are liable to be suspected of a methodologically and politically doubtful holism/collectivism.

If instead a systems-theory approach is chosen, the very distinction between individualism and collectivism becomes questionable (11). Systems theory neither reduces collective action to individual action nor vice versa, but interprets both as different forms of social attribution of action. The recently developed theory of self-referential systems in particular allows the legal person and its social reality to be understood without collectivist or organicist metaphors (12). The thesis to be developed below is that the legal person is neither a fiction à la Savigny, nor has it as its substratum the "physico-spiritual unity" of Gierke's real corporate personality, nor is it merely an autonomized pool of resources. Nor has a convincing social basis for the legal person yet been found in the social action system, not even with formal organization. Instead, we would suggest that the social reality of a legal person is a "collectivity": the socially binding self-description of an organized action system as a cyclical linkage of identity and action.

The compactness of this definition of our thesis admittedly makes it obscure and therefore in need of considerable amplification (given in II). This approach also has far-reaching

implications for legal theory, legal doctrine and legal policy, which can certainly not fully be worked out in this article. Some of the legal theory implications will be touched upon in a discussion of the relationship between the social reality and the legal regulation of the legal person (in III): What degree of freedom does the legal person have vis-à-vis the corporate actor? What is the function of legal personification of collectivities? The consequences of our thesis for legal doctrine (IV) will be treated in relation to the question of how the relationship between legal person and economic organization is to be dealt with in a legal sense. Finally, some legal policy implications (V) will be discussed under the heading of "enterprise corporatism": if a strategy of neo-corporatist producers' coalitions is developed as an industrial policy alternative to contractual flexibilization, how does this strategy relate to the impersonal order that the corporate actor represents?

II.

The contemporary debate on the legal person seems content to accept its purely technically legal character (13), but there are nevertheless views that stress its dynamic social reality (14). The most advanced proponents of this position are prepared to "award Gierke the palm", as long as his "real corporate personality" (reale Verbandspersoenlichkeit) is

cleansed of collectivist and organicist metaphors. But a peculiar embarrassment makes itself felt when it comes to defining how thorough the cleansing should be. What is left, after this purge, of the "physico-spiritual life-unit" of Gierke's "real corporate personality" (15)? After Rittner's treatment, we still have the objective spirit: a "special spiritual action centre of objectivity", which makes possible "the supra-individual continuity of (in the broadest sense) cultural substances" (16). Taking a suitable distance from neo-idealistic formulations, Wieacker in his turn has a go at social psychology: then all that is left is the empirical reality of the legal person in "group consciousness" (17). Ott allows the legal person more of a political reality: as the power and action centre of "private government" (18). In a particularly thorough cleansing, finally, Flume reduces the hard reality of "social entities" to Savigny's "ideale Ganze" (ideal whole), the more detailed definition of which, however, with wise self-restraint, he leaves open (19). By contrast with the burgeoning fullness of Gierke's real corporate personality, such a cleansed and filleted legal entity looks rather thin. Considering the original grandiose concept, this present state of debate seems rather petty-minded. Is Jellinek's call to make the pre-legal reality of associations independent of organism theory (20) unfulfillable even today?

Gierke's cardinal error was to conceive of the components of the association as flesh and blood people (21). When he

called associations "organisms whose parts are human beings" (22), he programmed the errors of organicist collectivism. Not only does this entail difficulties for the treatment of institutions (Anstalten), foundations (Stiftungen) and one-man companies, but by taking actual men as the essential elements of an association, it bars access to the social reality of associations, for then collectivities can be seen only as "supermen". Methodological individualism is quite right to attack such mystifications of collective units as supra-individual entities linking separate individuals into new wholes. It is however quite wrong to reduce the specific dynamics of social processes to individual action, and correspondingly to see collectivities such as the legal person only as mere abbreviations, shorthand expressions, "verbal symbols", for the complex aggregates of individual actions that are really involved (23). The eigendynamics of the legal person's substratum can be better understood by viewing the substratum as an autonomous communicative process, with actual people simply being treated as part of this process' environment. If this step is not taken and yet the social reality of the legal person is nevertheless maintained, one falls into the trap of organicist collectivism - or else one escapes into neo-idealism, social psychology, or politics.

If, then, the substratum of the legal person does not consist of an assemblage of individuals, what is it? Is it a social relation, an aggregate of roles, a decision-making

sequence, a chain of transactions or a resource pool? All these solutions have their advocates: Max Weber saw the associational reality as a "relation" (24); Talcott Parsons conceived of "actions" or "roles" as the reality of social systems (25); Chester Barnard dissolved the organization into "activities" (26), Herbert Simon into "decision premises" (27), Oliver E. Williamson into "transactions" (28); James Coleman sees the reality of the corporate actor in "pooled resources" (29). These are just a few of the authorities that have done without actual individuals as the units of the pre-legal reality of legal persons. But which of these elements ought to take the place of actual people?

With unerring intuition, Gierke found the criterion by insisting on the "livingness" of the association, on its internal dynamics and continual self-reproduction, concomitantly ridiculing the theories of Zweckvermoegen (resource pools, special-purpose funds) because only "organized associations of individuals with unitary associative will could have the animated body to which a genuine legal personality can be attributed, such as a mere purpose or a dead fund could never acquire" (30).

This argument of course reveals the second major error of organicist collectivism. Social systems are in fact not constituted on a basis of life as "real physico-spiritual units". This does not mean, however, that they need necessarily

be taken, as does Rittner, as substances of the objective spirit. One size smaller will still do. It is enough for social systems to be constituted as communicative units on the basis of social meaning, which excludes in principle both biologism and idealism. Nevertheless, if one abstracts from "life" and "meaning" in the direction of a theory of "self-reproducing systems", then one has found the criterion, with Gierke. The social substratum to be personified is not simply a (static) social structure. Instead, it is an eigendynamic system, with selections of its own, and with a capacity for self-organization and self-reproduction. All that Gierke had available to express this dynamism was the misleading metaphor of "life". Today for this we have the cooler, remoter concept of an autopoietic social system: a system of actions/communications that reproduces itself by constantly producing from the network of its elements new communications/actions as elements (31). Therein lies the dynamic social reality of the substratum: the legal person is based not on a mere social relation (Weber) or social structure (Parsons), but on a "pulsating" sequence of meaningfully interrelated communicative events, that constantly reproduce themselves (32).

From this position we can see that the purpose theories and pool theories of the legal person (33), even in their more recent versions of the organized special-purpose fund (organisiertes Zweckvermoegen) or resource pooling (34), are incomplete, applying to only a partial aspect of the whole.

Even if we ignore the less advanced purpose theories, which disqualify themselves by trivially defining the "Vermoegen" as things or assemblages of things, and consider only the more ambitious definition of Vermoegen as a bundle of property rights, such theories are of only limited scope. For even then they apply only to a (relatively static) substructure of a whole dynamic system of action - Gierke's "dead fund". For this reason, the more recent legal theories which argue on a corporate actor basis are superior in principle to those which argue on a basis of a resource pool (35), since they at least aim at the personification of the whole action system, and not merely of the partial aspect of the property rights structure.

Ought we, then, to take a self-reproducing action system as the social substratum of the legal person? No; for this, too, is accurate only in a very provisional sense, not to say misleading. The term "social action system" covers a multitude of social phenomena, from simple conversation and the group via law, the economy and politics, right up to the world society, far from all of which have any entitlement to legal personification. A qualifying characteristic must be added that justifies giving a social system the honorary title of "collectivity" or "corporate actor".

The criterion which is frequently chosen for this today is formal organization (36). The substratum of the legal person is said to be a formally organized social action system (37). This

certainly provides a plausible criterion, and at the same time covers the majority of empirical phenomena, namely formal organizations.

But however formal organization is defined, whether as a goal-oriented social system (38), a relation of bureaucratic domination (39), or a governance structure (40), none of these definitions catches the reality of the corporate actor or the collectivity. An organization does not become capable of action (in a pre-legal sense) by merely constituting itself as a goal-oriented system (41). Indeed, the social reality of the corporate actor is not located at all at the level of actual system operations (communications, actions, decisions). The emergent quality of a "corporate actor" arises from self-description in the action system itself. It is reflexive communication in the action system, communication on its own identity and its capacity for action, that constitutes the corporate actor or the collectivity as a mere semantic artefact, as a linguistically condensed perception of group identity. But it is only to the extent that such a corporate actor becomes institutionalized, i.e., that organizational actions are actually oriented round this self description, that the corporate actor takes on social reality (42).

Looking back from here once again at the old dispute on the nature of corporate personality, the ambivalence of the corporate actor, its remarkably fluctuating reality, becomes

clear. It is neither a pure fiction nor a real corporate personality - or else it is both at the same time. The corporate actor is "fictional" because it is not identical with the real organization but only with the semantics of its self-description. It is "real" because this fiction takes on structural effect and orients social actions by binding them collectively. Max Weber came closest to capturing this ambivalence by treating collectivities only as "ideas" in the heads of judges, officials and the public, while at the same time assigning them "a very powerful, often indeed predominant, causal significance for the way the action of real people unfolds" (43). Another who came close is Franz Wieacker, for whom "the socio-empirical reality of the social group types 'association, corporation' ... lies in the group consciousness of the members and their partners and in the specific nature of the group's behaviour" (44).

To be sure, both formulated only the psychic but not the social reality of the collectivity. It is not unexpressed ideas in the heads of those involved, but communicative self-descriptions in the organization as an action system that constitute the hard reality of the collectivity, the collective bond: "collective action is adopted as a premise in the meaning of other system actions, thereby limiting possibilities" (45).

An additional step further beyond Max Weber, who explicitly denied collective entities the capacity for action, is necessary

in order to throw full light on the substratum of the legal person. For the social self-description of collective identity - "corporate identity" - only succeeds in conveying a half impression of the corporate actor. Only a first approximation of the collectivization of a group can be obtained from representing it as the institutionalization of collective identity, be it on the model of a human person or of an organism. To gain a full understanding, the collectivity must instead be seen as a dyadic relationship. This is, say, what Parsons does in construing it as a relationship between "solidarity" and capacity for "action in concert" (46).

The key to understanding lies in the cyclical linkage of action and collective identity via mechanisms of attribution. Even in the case of simple interaction or of the group, the everyday understanding of acting individuals must be re-directed so that events become system actions only once the communication network regards its participants or members as "persons", i.e., only once individuals are constituted as social constructs, and particular events are then assigned to these self-created communicative realities (47). Even at the level of interactions and groups, then, it is mechanisms of attribution that constitute system actions (actions of the system itself (as collective actor)) by contrast with environmental events (actions (of people) within the system). It is only by taking this construction seriously that one can understand the process of collectivization. Collectivization means a shift in the

attribution of an action from one social construct to another, from a "natural" to a "legal" person. A self-description of the system as a whole is produced and to this construct actions are attributed as actions of the system. This is a self-supporting construction: collective actions are the product of the corporate actor to which events are attributed, and the corporate actor is nothing but the product of these actions.

A first interim result might then be as follows: the social substratum of the legal person is neither an assemblage of people nor a pool of resources nor a mere organizational structure. Nor is it adequately characterized as an action system or as formal organization. The substratum is conceived properly as a "collectivity" or "corporate actor", i.e., the self-description of a (usually formally) organized social action system that brings about a cyclical linkage of self-referentially constituted system identity and system elements.

III.

If we now know everything about the "substratum" of the legal person, we still know nothing about its "essence". For the question of "essence" changes the system reference from the organization to the law, bringing up the question of what room the legal system has for manoeuvre in its external description of the self-description of an organized social system. What

freedoms can the legal person assume vis-à-vis the corporate actor? All freedoms and every freedom, is the answer in good positivist language. Even if we no longer see the substratum merely diffusely as a "social phenomenon", an "action centre", an "acting unit" and the like, but more precisely as a "collectivity" in the sense defined above, there still remains a difference in principle between the social structures and the legal structure of corporate personality. There are no fixed objective relationships between pre-legal structures and legal construction. There is no sociological natural law of the legal person. If legal positivity is to be taken seriously here, too, then one would on the contrary have to expect a high degree of variability between law and social substratum. As Selznick says: "...the institutional perspective is quite compatible with a more selective policy-oriented concept of the corporation" (48).

From the systems-theory point of view, too, the autonomy of the legal system in the construction of its own environment and in the choice of its distinctions must be stressed. This is external observation of a self observation: the legal system observes, using its own conceptualizations, how the organized social system observes itself as a "collectivity", or else how it is observed as such by its environment. The legal system is in no way "bound" by the self observation, nor by other (e.g. psychological, sociological or "life world") external observations of this self observation (49). There is therefore no contradiction between on the one hand stressing the social

reality of the substratum and on the other defending a positivist or constructivist concept of the legal person. The most decisive advocate of this position was perhaps Kelsen: the legal person is a partial legal suborder, a complex of norms relating to a particular legally defined entity (contract, corporation, association, federation, municipality, state). In the personification, the norm complex is nothing but a point of attribution (50). Kelsen's problem, however, lies in his rigid separation of the social and the legal spheres, the interaction of which is set aside by erecting a conceptual barrier.

Accordingly, nothing prevents the legal system from taking any object whatever - divinities, saints, temples, plots of land, art objects - as points of attribution and giving them legal capacity (51). Trees particularly are prominent candidates: in legal theory and legal policy discussion they are continually raised as potential legal subjects - quite rightly today ("Should trees have standing?") (52).

But it is amazing that, despite an extremely high degree of freedom and choice, there are nevertheless such great structural correspondences between "collectivity" and "legal person" (53). It is not only that the social and legal mechanisms of action attribution to constructs produced within the system (individual/collectivity in the social world, natural person/legal person in the legal world) are in principle structured in a parallel fashion. It is more striking that the

law today makes practically no use of its positivist freedom and exclusively promotes "collectivities" to the status of legal persons (in the sense defined above, even a one-man-company is a "collectivity"!). Flume has argued forcefully that it makes no sense to subsume the complex reality of the legal person under a "unitary concept": "What meaning is it supposed to have if one covers the reality of the state, of municipalities, of churches, of a corporation, of a foundation, of a sporting association etc. in a unitary concept?" (54). But the concept of "collectivity" or "corporate actor" developed above (i.e., self-description of an organized social system as the link between identity and capacity for action) shows instead that it certainly does make sense to subsume these social phenomena under a unitary concept.

What are the objections to the unitary concept? Certainly not the fact of acting in different spheres (e.g., politics, economy, culture, religion, leisure). More problematic are the important differences that exist between associations, institutions and foundations. Because of these differences it is often believed that there can be no unitary concept of the substratum. For in the case of associations it can only consist of human beings, whereas for foundations and institutions it is only the resource pools that could be the real substratum (55). But this is precisely the point at which collectivity and the corporate actor step in, supplying a more precise unitary

concept of the substratum than, say, Rittner's and Flume's vague concepts of "action unit" and "social phenomenon" could do.

The thesis is that, without being normatively compelled to do so, the law regularly binds up legal capacity with a large set of prerequisites of a particular social reality, which can be described by a "unitary concept". These prerequisites are: (1) (formally) organized action system, (2) a self-description of a collective identity, (3) a cyclical linkage of identity and action via mechanisms of attribution. And thus we return to the social system's unitary concept of the collectivity.

The reasons for this close correspondence between law and society, astonishing from the viewpoint of positivist freedoms, are neither of natural law nor of legal logic, but merely of legal policy. Giving legal capacity to social formations makes policy sense only when they have a highly developed internal order (56). Social capacity for action, i.e., the capacity for attributing external effects to the social system as such, implies that actions of certain individuals are attributed to all participants, socially entitling and obligating them. This calls for an order that has many social prerequisites: "the development of leadership structures, the formation of media for transferring selections in the system, mainly of power, the legitimation of representation rules and distributive processes with external or internal effect, and, not least, a certain

alleviation of personal attribution, plus provision, despite this, for motivation and responsibility" (57).

These requirements can be summarized in the formula "social capacity for collective action". As a rule, it makes legal policy sense to grant legal capacity to social systems that already have capacity for collective action. As the German example of the nichtrechtsfaehiger Verein (association without legal capacity) or the Italian example of the Mafia shows, there may be powerful legal policy reasons which militate against the granting of legal capacity to certain social systems even though they are effectively capable of collective action. At the same time, the examples of political parties and trade unions show that once collective capacity for action has been developed, the legal system is exposed to massive pressure to complete the social personification by legal personification.

The second reason supporting a correspondence between the social and legal structure lies deeper. It concerns the social function of legal personification. This is understood quite inadequately if only the advantages of limited liability are taken into consideration and if the disadvantages are partially compensated for by "piercing the corporate veil" (58). Much more important aspects are, for example, the saving in transaction costs and the coordination advantages of "resource pooling" (59); efficiency gains deriving from the legal support of the capacity for action of the system as such (60); the positional

advantages for the organization in contacts with the environment (61); or, last but not least, the well known "legal immortality" (62). The really interesting "emergent property" lies, however, in the building up of a (second order) autopoietic system (63). By the cyclical linkage of identity and action perfected in the legal person, the action system acquires a hitherto unachieved autonomy vis-à-vis its environment, both the external environment of market and politics and the internal environment of members and others involved in the organization. The legally supported personification is a decisive step towards complete operational closure, which at the same time means a new type of environmental openness, i.e., a step towards that linkage between closure and openness which is typical of autopoietic systems and is the basis of their evolutionary success (64).

This clears the way for transferring the profit motive from shareholders to the "Unternehmen an sich" (enterprise in and of itself), and would make the criteria of social responsibility apply not only to the personal actors, but also to the organization in terms of "corporate" social responsibility (65). The development of autopoietic autonomy thereby also opens up far-reaching perspectives of economic and political control. As Renate Mayntz recently rightly stressed, although autopoietic closure of formal organizations produces opaqueness and therefore control problems, it nevertheless also at the same time creates new opportunities for political and legal control (66). On the whole, then, the self-description as "collectivity"

contributes to producing the "unity" of the system. It allows for "operational closure" of the self-referential information process and for "structural coupling" to the needs and interests of the environment.

The second interim result could be formulated as follows: in the sense of positivist or constructivist theories of the legal person, the law has great freedom as to what social phenomena are to be given legal capacity. Nevertheless, in practice there exists a great correspondence between social structures and legal structures of corporate personality, which justifies a unitary concept of the substratum as collectivity or corporate actor. The basis for this is the linking of legal capacity to the social capacity for collective action. Its function is the building up of a second-order autopoietic system, which allows a new combination of operational closure and environmental openness.

IV

Of what concern is all this to the practicing lawyer? A great deal; for, apart from consequences in legal theory, this view of the "essence" of the corporate personality also has implications for legal doctrine. If its "essence" lies not in resources nor in people but in the legal reconstruction of a collectivized action system, this has immediately foreseeable

consequences for such exotic legal phenomena as the one-man-company, and the "personless corporation". The "personless corporation" not only becomes conceivable, but is always presupposed (67). But consequences then also have to be drawn for the legal conceptualization of corporate membership and of corporate bodies ("Organe"), since in the glaring light of systems theory corporate members and corporate bodies evaporate into mere bundles of roles (68). When the issue of the disregard of the corporate entity is raised, the legal person is to be "taken seriously" in a different sense than that recently proposed (69). And the relationship between "unity and multiplicity in the group enterprise" should be re-thought in relation to the legal capacity for action of the group enterprise as a whole (70). Obviously the new "group theory" of German partnership law (Personengesellschaft) developed by Flume would require critical examination specifically as to whether the distinctions still affirmed in the concept of "group" between an association of persons and the person of the association can in fact be maintained (71). Here, however, we shall consider only one legal problem in more detail, specifically because it lies at the crossing point of questions of legal theory, legal doctrine and legal policy: the "legal nature" of the business enterprise, in particular the relationship between the enterprise and the legal person (72).

On this issue Thomas Raiser's bold sortie has assured prolonged controversy, fuelled still further by its legal policy

implications in the codetermination debate. Raiser argued that de lege lata the enterprise as such (as opposed to the association of shareholders) was increasingly developing into the real point of attribution for legal rules, that it was "pressing" for legal capacity, and that de lege ferenda the enterprise as such should be assigned legal capacity (73).

This thesis has been challenged on many grounds, the most interesting of which for our purposes here are the legal theory arguments which purport to refute the "suitable ideology" (74) from a seemingly higher standpoint. Professor Rittner teaches that "for logical reasons alone it is out of the question to declare that the enterprise itself is the 'subject' (Traeger) of the enterprise" (75). Professor Flume caps this with : "MUENCHHAUSEN jurisprudence"! (76). That is intended to discourage pursuit of the idea. Yet one's ears prick up when both scholars thereupon themselves start operating in the immediate vicinity of Muenchhausen. In the case of the stock corporation (Aktiengesellschaft), Flume "identifies" (!) the enterprise with the legal person "because it belongs (!) to it" (77). Can something belong to itself? Rittner too builds a self-referential construction whose compatibility with the presupposed logic would require some checking, when he maintains that the "enterprise in the broader sense" is the representative of the "enterprise in the narrower sense". Furthermore in the area of overlap between the "narrower" and "broader" enterprise he does just what he previously said was out of the question,

namely he declares "the enterprise to be the representative of the enterprise".

It is striking how many arguments for and against Muenchhausen accumulate around the topic of the legal person. There is the time-honoured argument that the fiction theory is false because the State itself, as a legal person, would then have to be a fiction, whereas the State could not, like Muenchhausen, have erected itself by mere motion into a legal fiction (78). Then, by contrast with Flume who angrily rejects this argument as speculation, Hofstadter of Goedel-Escher-Bach would joyfully welcome it: "Reflexivity of law"! (79). We also find that Kelsen's concept of legal person as legal suborder and point of attribution has been objected to on the grounds that the statement that the legal suborder is itself a bearer of norms is a tautology: the construction would have to support itself, "like the late Baron Muenchhausen" (80). And in this same context we are even confronted with the attempt of German corporation law to circumvent Muenchhausen by making the enterprise have a "subject" (Traeger) different from itself, namely the legal person, which in turn is supposed to have a substratum different from itself, namely the association of persons or the resource pool (81). Obviously this is an attempt to avoid such tautologies and circular arguments as that the firm "represents" itself or that the legal person is "based" on itself.

But perhaps the mendacious Baron was not so wrong after all? Perhaps there really are, in the area of the legal person, circular relationships. May not the legal person's function indeed consist in making self-reference possible and in increasing self-reference still further in the interest of organizational autonomy? This, at any rate is what the theory of self-referential systems, which has been successfully applied in such varied fields as logic, computer science, neurophysiology, sociology, business organization and legal theory (82) and is here being applied to the theory of the legal person, would suggest.

This prompts the following two theses: (1) the traditional demarcations between the enterprise, the legal person and its substratum are to be interpreted as attempts to avoid self-referentiality in corporation law. Under this smokescreen, however, self-referentiality was actually able to make its way into the reality of the enterprise. (2) If the taboo of self-referential circularity is broken, the view opens up on to a self-supporting construction: the "subject" (Traeger) of the enterprise is the collectivity, constituted as legal person; the "substratum" of the legal person is the enterprise personified as collectivity (83).

This formulation of a strictly circular relationship between the enterprise and the legal person seems tautological, incompatible with existing law and unconstitutional as

expropriation (84). But before condemning it out of hand, one ought to examine the formulation very closely, bearing in mind that in a systems-theory formulation both concepts - enterprise and legal person - are related to a third, that of the collectivity. They thus go through a change in meaning, able to transform the tautology into impure self-reference, the illegality into defensible alternative interpretation and the expropriation into legitimate state interference (Sozialbindung).

Let us clarify this against the two most advanced positions (Raiser and Flume). Raiser's definition of both terms - enterprise and legal person - is still too person-related and insufficiently systemic. While he does manage, as he himself rightly comments (85), to reach a higher stage of scholarly reflection using the organization sociology approach (mainly Talcott Parsons and Renate Mayntz) to expose the enterprise as an organized system of actions, he nevertheless frequently falls back on the current stage of formulations in the course of analysis. Thus, for instance, he argues that "as the aggregate of its members", the enterprise is also a "stock of material and personal resources" (86). He thereby plays away the advantages of the systems-theory conception of the firm, according to which members and material resources constitute environment. When he goes on to see the workers as members of the organization in the legal sense, then he is, admittedly, forced

to postulate the legal personification of the enterprise only de lege ferenda.

On the other hand Raiser also conceives of the legal person too personalistically. He stresses its associational character and thereby "internalizes" the shareholders into the legal person. The association of shareholders thereby implicitly becomes the legal person, while the other subassociations, that of the workers and that of the managers, as well as the enterprise as the overall association that incorporates these subassociations, are (still) denied the privilege of legal personification. This corresponds to current conceptions whereby the company of shareholders as a legal person is the subject of the enterprise; but it nevertheless leads to group-specific asymmetries which do not at all originate in the legal person - even, indeed, in Savigny's classical conception. If the legal person is bound up to that extent with the group of shareholders, and no clear division of spheres is made between legal person and members (88), then here too all one can do is call for changes de lege ferenda.

With two bold conceptual steps, Flume has overtaken Raiser and managed in the outcome to identify the enterprise, already de lege lata, with the legal person, at any rate for the case of the stock corporation. In all rigour, he brings about the separation, already begun in Savigny, between the sphere of the legal person and the sphere of the members (89). He thereby

disqualifies the identification of the shareholders' association with the legal person as the famous major error that "identifies the totality of current members with the corporation itself" (90). The sphere of the "ideal whole", as it were hovering free, can then be linked with the enterprise whereby "both the enterprise with everything belonging to it, those working in it, the assets and liabilities and the members of the legal person" (91) are brought together as integral components of the "ideal whole" of the legal person. Flume thereby goes a considerable step beyond Raiser. The latter, in strict obedience to lex lata, declares the firm to have legal competence only insofar as rules of law in force positivize the enterprise explicitly as a point of attribution and sees the enterprise's full legal capacity as a task de lege ferenda. Flume, by contrast, takes a cavalier attitude towards the law and already identifies the enterprise with the legal person under the prevailing state of the law.

Yet for all the boldness of the construction, even Flume has still not gone far enough. He limits the identification explicitly to the stock corporation, remaining remarkably ambivalent as regards the limited liability company (Gesellschaft mit beschränkter Haftung) (92). He understands it substantively as a kind of partnership (Personengesellschaft) which is however autonomized as a legal person by virtue of its limited liability limitation alone. But he sees at the same time that this is untenable for the "big" limited company. He takes refuge in the legal policy recommendation of making the

legal form of the stock corporation compulsory in these cases (93). There is a similar ambivalence about Flume's sharp distinction between corporations (Kapitalgesellschaften), where legal person and enterprise are supposed to be identical, and partnerships (Personengesellschaften), where the old notion that the partners are the "subjects" of the firm is supposed to remain. Whether, without internal splits, it is possible on the one hand to transform the partnership into a quasi-collectivity, with the "group" as the "action centre", and on the other to make a fundamental distinction between "group" and legal person in their relationship to the enterprise, seems at least questionable.

The second objection is that Flume, although he consistently separates the sphere of the "ideal whole" from that of the members, ultimately is not consistent enough to define the human individuals as the environment of the spheres of enterprise and legal person, but instead includes both the members (i.e., shareholders) and those working in the firm (i.e., management and employees) in the concept of the enterprise and that of the legal person (94). This means that he inevitably gets bogged down again in a misconceived debate that links the relationship between legal person and enterprise with the membership question, i.e., the question whether only shareholders are members of the enterprise, or also managers and workers, or even major customers, consumers etc.

That this debate is misconceived can be demonstrated on the basis of the third objection to Flume's theory. Flume falls for the current conceptual model which allows as the reference point for the legal person only the alternative between the shareholders' association or the enterprise. What has legal capacity, according to this model, is either the association comprising only the shareholders, or else the whole enterprise, including shareholders, management and others involved. Tertium non datur? Here the circuit to the systems-theory concepts developed above is closed, and at the same time it becomes clear that for all the "technical" legal understanding, the question of the substratum cannot be foisted off on to sociology. Neither the shareholders' association nor the enterprise as a whole are identifiable with the legal person, but only the above defined corporate actor or the collectivity.

The point that, due to the clear separation of spheres, the association of shareholders and the legal person are not identical has been made adequately clear by Flume himself. Their spheres of action overlap only as regards the actions of corporate bodies. But to make the whole enterprise into the legal person instead, as Flume does, is to go far too far. For what acts as the "centre of action" is not the whole action system of the enterprise, but only the subcomplex which above we called "collectivity". Legal capacity is given only to the extent that collective action is involved. All that is affected is the subset of action in the whole enterprise which is to be

attributed to the system as a whole in collective linkage. The legal person covers not the whole action system of the enterprise, but only the subset of action called collectivity, i.e. only those actions covered by the attribution mechanisms of corporation law, agency law, and labour law. It may sound unusual to name these phenomena in one breath, but they have function in common: they transform individual action (of "members" or "workers") in the system into collective action by the system.

This makes clear why the problem of the legal person vis-à-vis the enterprise is not to be bound up with the membership question, as keeps on happening. Put rather crudely: not the scope of the membership but the scope of the corporate organs (Organe) decides what actions belong to the legal person. Or as Rittner so prettily puts it, the corporate organs (Organe) are "parts of the legal person itself, through which alone the latter can come to life " (95). It is important, however, not to forget the other two attribution mechanisms (agency law and labour law). The transformation processes that are decisive for the action area of the legal person accordingly take place not in the area of membership (expropriation!), but within the attribution mechanisms for collective action.

Both factual and legal transformations play a part here, as do private law-making and governmental regulation. The action area of the legal person expands through the private

installation of new corporate bodies in the firm, particularly newly set up consultative councils, committees, etc., through which environments of the firm are co-opted (96). It likewise changes through the creation or alteration of corporate bodies by governmental regulation (corporate governance and codetermination). But factual transformation processes within the firm, notably decentralization, divisionalization and functional democratization, also change the action area of the legal person. The attribution mechanisms are changed: hierarchical attribution to the top of the organization gives place to an attribution to the action of autonomous decision-making centres within the firm based on its executive bodies (divisions, profit centres, autonomous working groups, quality circles).

A further interim result might, thus, be added to the differentiation between enterprise and collectivity: it is an error to identify the legal person with the association of shareholders. Even de lege lata - Raiser would have to be re-formulated - the enterprise personified as collectivity has legal capacity, and for all enterprises with legal capacity - Flume would have to be re-formulated - the legal person is identical with the collectivity, as the personification of the enterprise.

A new "suitable ideology"? It has already been claimed about theories of the enterprise as a "social association" (Sozialverbandstheorien) that they were created in order to provide ideological support for codetermination (97). The "Unternehmen an sich", enterprise in and of itself, too, is supposed to have been only an ideology aimed at helping managerial capitalism over the hurdles against financial capitalism, in legal terms (98). This obviously prompts the search for political economic interests being pursued in a systems theory of the firm. Well then, if it must be: the systemic approach formally takes its distance from the models of financial, managerial, labour and state capitalism. At most it could be said that it is pursuing the interests of an organizational capitalism. Or rather more seriously, a systems theory of the firm as a self reproducing social system may suggest a legal policy of "enterprise corporatism".

This cautious formulation should ward off too much "detroitologia" in advance. It would be rather unreasonable to maintain that neo-corporatism is the political consequence of systems theory (99). For there are many versions of systems theory, as it were "emancipatory", "technocratic" and "evolutionary" versions. And the systems theory analyses of enterprise, collectivity and legal person attempted above still claim to be correct even if enterprise corporatism should prove to be a legal policy failure.

All the same, there is a link between systems-theory analyses and legal policy recommendations, albeit a much looser one than the suspicion of a "suitable ideology" supposes. On the one hand a theoretical apparatus always perceives reality only selectively (for instance a systems theoretician sees only elements, structures and processes, where other observers see flesh-and-blood individuals acting) and correspondingly makes legal policy recommendations directed only to this selected reality. Secondly, systems theory asserts quite specific evolutionary trends which only once formulated can one think of influencing through legal policy intervention. In economic enterprises a trend can be observed to the autonomization of an impersonal economic complex of action, consisting of the differentiation of the corporate actor, with a sharp demarcation between those involved internally and externally. This trend is perceived as collectivization of an autopoietic social system. One may seek to combat this trend in legal policy through such concepts as shareholders' democracy, codetermination or government participation, or else one may see the autonomization of the organization as a promising development in the interest of society as a whole in guaranteeing need satisfaction for the future, following a direction that the law can to some extent help to influence (100). The name for that direction is enterprise corporatism.

Neo-corporatist strategies are not in vogue at present. On the contrary, in a period of extremely rapid market changes,

increased pressure of competition and weakening or collapse of governmental regulatory systems, industrial strategies are being pursued for which neo-corporatist arrangements appear rigid, centralist and immobile (101). The new slogan is decentralization and flexibilization through contractual arrangements, and this applies also to methods of finance, technologies, product range, customer relations and labour relations (102). The aim of recent industrial policy is flexibility as a value in itself: "a general capacity of enterprises to reorganize in close response to fluctuations in their environment" (103).

While flexibility through contract is the prevailing demand at the moment, there is also an alternative being put forward in the heated debate on "Americanization" or "Japanization" of the European economy: flexibility through organization (104). Its defenders can point out that flexibility can be brought about not only through contractual arrangements but also through decentralization of organization, and that a policy based on organization can additionally use the productivity advantages of a "producers' coalition" (capital, management, labour, State), which in the conditions of the new industrial divide are becoming increasingly necessary.

This industrial policy position is close to the ideas developed here. In fact, to privilege one group, whether shareholders or management, that acquires flexibility through

contractual arrangements would be bound to be suboptimal in the organizational interest of the corporate actor. Certainly, the advantage of contractual arrangements lies in the speed of reactions with which action systems can be built up and demolished in the short term, in accordance with the fluctuations of environmental pressures. The drawback, however, is that contractual solutions cannot exhaust the "organizational surplus value" (105). "Organizational surplus value" arises (1) through the building up of long-term cooperative arrangements which would be continually destroyed by contractual flexibility; (2) through the diffuseness of "commitments" in the organization which by comparison with rigid, sharply defined contractual obligations produce more situational flexibility; and finally (3) in the orientation towards the organization's interest, which provides stronger orientation than mere linkage to a contractual purpose.

This suggests a law of corporate governance based on a microcorporatist producers' coalition. According to this none of the resource providers, neither the factor of capital, nor that of labour, nor that of management, nor indeed the factor of state control, has any natural claim to "sovereignty over the association". In principle the connection between resource provision and control rights is loosened, and all control rights over all resources are assigned to the corporate actor as such. The idea of "organizationally bound property rights" (106) is diametrically opposed to the idea that the firm constitutes a

mere "contractual network". The distribution of control rights within the firm is then made neither according to the primacy of one resource interest nor according to exchange logic in a contractual network, but according to efficiency considerations oriented towards the interest of the "corporate actor", which is different from all of the participating interests.

Even if the external integration effects and internal motivation effects of microcorporatist arrangements are recognized, still the external disadvantages of producers' coalitions have to be pointed out, especially the fact that they may arrive at their agreements at the expense of third parties and even of the public interest (107). Here is the real weak point of enterprise neo-corporatism in the sense of a producers' coalition. However, the "corporate actor", the existence of which is asserted against all methodological individualism, steps in to set the legal policy direction. Efforts should concentrate on the institutional strengthening of the corporate actor, the autonomization of an impersonal complex of action which imposes effective constraints on action upon the individual interests involved, in the interest of the organization defined in terms of society as a whole.

FOOTNOTES

1. Piore/Sabel, *The New Industrial Divide*, 1984; Kern/Schumann, *Das Ende der Arbeitsteilung? Rationalisierung in der Industriellen Produktion*, 1984; Streeck, *The Management of Uncertainty and the Uncertainty of Management*, manuscript 1985.
2. Wilhelm calls for the legal person to be taken seriously: *Rechtsform und Haftung bei der juristischen Person*, 1981, *passim*.
3. Joerges, *Juristische Person*, in: Goerlitz, *Handlexikon zur Rechtswissenschaft*, 1972, 222ff.; Ott, *Recht und Realitaet der Unternehmenskorporation*, 1977, esp. 43ff., 85ff.; a new impetus comes from the U.S.A.: Dan-Cohen, *Rights, Persons and Organizations*, 1986, esp. 26ff., 163ff. From a political science viewpoint, Mayntz, *Corporate Actors in Public Policy: Changing Perspectives in Political Analysis*, 1986. From an economic viewpoint, Hutter, *Die Produktion von Recht*, Muenchen, 1986, Chap. 4D.
4. Ott (fn. 3) 283ff.
5. Buxbaum, *Corporate Legitimacy, Economic Theory, and Legal Doctrine*, *Ohio State Law Journal* 45 (1984), 515ff., 520; Teubner, "Corporate Responsibility" als Problem der Unternehmensverfassung, *ZGR* 1983, 34ff.
6. Strauss, *Industrial Relations: Times of Change*, *Industrial Relations* 23 (1984) 1ff.
7. Streeck (fn. 1) 21ff.; cf. Ladeur.
8. On the individualism/collectivism debate, decisively influenced by Popper and Hayek, cf. Phillips, *Holistic Thought in Social Science*, 1976; Vanberg, *Die zwei Soziologien: Individualismus und Kollektivismus in der Sozialtheorie*, 1975; Bohnen, *Individualismus und Gesellschaftstheorie*, 1975.
9. Z.B. Alchian/Demsetz, *Production, Information Costs and Economic Organization*, *American Economic Review* 62 (1972) 777; Jensen/Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structures*, *Journal of Financial Economics* 3 (1976) 305; Fama, *Agency Prooblems and the Theory of the Firm*, *Journal of Political Economy* 88 (1980) 288; Cheung, *The Contractual Nature of the Firm*, *Journal of Law and Economics* 26 (1983) 1ff.; for the transactional approach Williamson, *The Institutions of Capitalism*, 1985.
10. Coleman, *Power and Structure in Society*, 1974; *idem.*, *The Asymmetric Society*, 1982; *idem.* *Responsibility in Corporate Action: A Sociologist's View*, in: Hopt/Teubner, *Corporate Governance and Directors' Liabilities*, 1985, 69ff.; Vanberg, *Markt und Organisation*, 1982, 8ff., 37ff.; *idem.* *Das Unternehmen*

als Sozialverband, Jahrbuch fuer Neue Politische Oekonomie 1 (1982), 276ff.; also Krause, Corporate Social Responsibility: Interests and Goals, in Hopt/Teubner, Corporate Governance, 1985, 96ff., 102f.

11. This must be explicitly stressed, because systems theory has the reputation of taking the stance of holism/collectivism. However, collectivism and individualism are "over-hasty options" or system theory; cf. Luhmann, Wie ist soziale Ordnung moeglich? in: ibid., Gesellschaftsstruktur und Semantik 2, 1981, 245ff.

12. On the connection between self-reference and personification of the organization, see Teubner, Hyperzyklus in Recht und Organisation, EUI Working Paper 86/211, 40ff., also in: Haferkamp/Schmid, Diskussionsband zu Niklas Luhmann, Soziale Systeme, 1986.

13. For the older debate on the legal person, see in detail H.J. Wolff, Organschaft und juristische Person I, 1933, 1-87; Hallis, Corporate Personality, 1930.

14. For the recent debate in the U.S.A. see Dan-Cohen (fn. 3). A survey of the recent German debate is in, for instance, MK-Reuter, paras. 21, 1ff.; Stahdinger-Coing, Einleitung zu paras. 21-89, 1ff.

15. Gierke, Das Wesen der menschlichen Verbaende, 1902, 12. On the problems of the organism analogy see Rottleuthner, Biological Metaphors in Legal Thought, in: Teubner, Autopoietic Law, 1986 and more generally, Dachler, Some Explanatory Boundaries of Organismic Analogies for the Understanding of Social Systems, in: Probst/Ulrich, Self-Organization and Management of Social Systems, 1984, 132ff.

16. Rittner, Die werdende juristische Person, 1973, 211, 214 et passim. For a skeptical review see Ulmer, Zu einer neuen Theorie der juristischen Person, ZHR 140 (1976) 61ff.

17. Wieacker, Zur Theorie des juristischen Person des Privatrechts, in FS Huber 1973, 339ff., 367.

18. Ott (fn. 3) 85ff.

19. Flume, Die Juristische Person, 1983, 25ff.

20. Jellinek, Allgemeine Staatslehre, 1920, 170.

21. Gierke, Deutsches Genossenschaftsrecht III, 1881; IV, 1913; idem. (fn. 15); **** idem., Deutsches Privatrecht I, 1895, 466ff.

22. Gierke (fn. 15) 13.

23. For an extreme formulation see e.g. Radin, *The Endless Problem of Corporate Personality*, 32 *Columbia University Law Review* (1932) 643. for further sources see fn. 8.
24. Max Weber, *Wirtschaft und Gesellschaft*, 5. ed. 1972, 26ff.
25. Parsons, *The System of Modern Societies*, 1971, 4ff.; Parsons/Shils, *Toward a General Theory of Social Action*, 1951, 190.
26. Barnard, *The Functions of the Executive*, 1938, 73ff.
27. Simon, *Administrative Behavior*, 3. ed. 1976, XVIIff.
28. Williamson (fn. 9) *passim*.
29. Coleman (fn. 10).
30. Gierke, *Die Genossenschaftstheorie und die deutsche Rechtsprechung*, 1887, 11f. See also *idem* (fn. 21) 1895, 472: "... a living being that wills and acts as such." Today it is notably Selznick, *Law, Society and Industrial Justice*, 1969, 43ff., who stresses the living, dynamic character of the "corporate entity".
31. Luhmann, *Soziale Systeme*, 1984, is basic. On the autopoietic nature of social systems, see the lively discussion in the collective volumes Benseler/Hejl/Koeck, *Autopoiesis, Communication and Society*, 1980; Dumouchel/Dupuy, *L'auto-organisation. De la physique au politique*, 1983; Ulrich/Probst, *Self-Organization and Management of Social Systems*, 1984; Haferkamp/Schmid (fn. 12); Teubner, *Autopoietic Law*, 1987. For an assessment of the theory of self referential systems in its implications for law by a "fascinated sceptic", see Wiethoelter, *Sanierungskonkurs der Juristenausbildung? Kritische Vierteljahresschrift fuer Gesetzgebung und Rechtswissenschaft*, 1 (1986), 21ff.
32. In this sense Hutter (fn. 3), 112, defines persons as "social systems to which communications are ascribed".
33. The founder is Brinz, *Lehrbuch der Pandekten* 3. ed. 1884, I, ss 60f., III, ss 432ff.; Bekker, *System des heutigen Pandektenrechts*, 1886, ss 42f.
34. Wiedemann, *Juristische Person und Gesamthand als Sondervermoege*n, *WM* 1975, Sonderbeilage Nr. 4; *ibid.*, *Gesellschaftsrecht I*, 1980, 195ff. Coleman (fn. 10); Vanberg (fn. 10).
35. Rittner (fn. 3) 210ff.; Ott (fn. 18) 85ff.; Flume (fn. 19).
36. For organization in a specifically legal sense see John, *Die organisierte Rechtsperson*, 1977 *passim*. The more recent "technical legal" definitions of the legal person also like to

use the metaphor of "organization"; see e.g. BGHZ 25, 134, 144; Enneccerus/Nipperdey, Lehrbuch des Buergerlichen Rechts 1959, paras. 103; Soergel/Schulze-von Lasaulx, BGB, vor s 21, 3; MK-Reuter, vor s 21, 3; Staudinger-Coing, Einleitung zu ss 21-89, 5ff.

37. For organization in a precise sociological sense see Rotter, Zur Funktion der juristischen Person in der Bundesrepublik und in der DDR, 1967, 30ff.; T. Raiser, Das Unternehmen als Organisation, 1969, 93ff., 166ff.; Ott (fn. 3) 85ff.; Dan-Cohen (fn. 3) 26ff.

38. Parsons, Structure and Process in Modern Society, 1960, 17, 63; Mayntz, Soziologie der Organisation, 9. ed. 1977, 40. Etzioni, Complex Organizations, 1961, 1. Blau/Scott, Formal Organizations, 1962, 5.

39. Max Weber (fn. 24) 154, 549, 659, 833f. and the literature on "private government".

40. Williamson (fn. 9) 298ff.

41. Luhmann, Einfache Sozialsysteme, in: *idem.*, Soziologische Aufklaerung 2, 1975, 21ff. 32f.; *idem.* (fn. 31) 270ff.

42. On this see Teubner (fn. 12), which also gives more details on the connection between interaction, group and organization, seen as a cumulative rise in self referentiality to the point of hypercyclical linkage.

43. Max Weber (fn. 24) 6f.

44. Wieacker (fn. 17) 367.

45. Luhmann (fn. 31) 273f. The fact that this is supposed to be a merely psychology reality is seen by Wieacker (fn. 17) 369 as a problem, since the legal order has only an external (i.e. social) approach to the object. It is, then, all the more important to be able to analyse the social reality of the collective and the collective bond by comparison with the merely psychic one. On the emergent quality of collective vis-é-vis individual constructions of reality see Dachler, (fn. 15), 132ff., 140.

46. Parsons, The Social System, 1951, 41, 96; *idem.*, Societies, 1966, 187; *idem.*, The System of Modern Society, 1971, 6ff., 23f.; Parsons/Shils (fn. 25) 61, 192; Parsons/Smelser, Economy and Society, 1956, 15f.

47. Luhmann (fn. 31) 155, 225ff.

48. Selznick (fn. 30) 48. On the parallel question of the "Gesamthand" cf. Teubner, AK-BGB, ss 705ff., 21ff. Herein lies the relative justification for the present "technical legal" understanding of the legal person, in e.g. Staudinger-Coing,

Einl. ss 21ff., 4ff., MK-Reuter, vor s 21, 2; John (fn. 36) 66ff. Its problem is however to derive from the variability between legal concept and social phenomenon to the irrelevance of the social phenomenon for the legal concept. The legal system, as the debate on the legal concept of the firm decisively shows (see IV below), needs not only a legal concept of the legal person but also a legal concept of the substrate.

49. From this point of view one may sympathize with H.L.A. Hart, *Definition and Theory in Jurisprudence*, *Law Quarterly Review* 70 (1954) 37, when he calls for abandonment of the "ever baffling question" of "what is any association or organized group?" and its replacement by the question "Under what conditions do we refer to numbers and sequences of men as aggregates of individuals and under what conditions do we adopt instead unifying phrases extended by analogy from individuals?".

50. Kelsen, *Allgemeine Staatslehre*, 1925, 66ff.; similarly H.J. Wolff (fn. 13) 170ff.

51. Wieacker (fn. 17) 359.

52. Kohler, *Lehrbuch des bürgerlichen Rechts I*, 1906, 230; H.J. Wolff (fn. 13) 62; Stone, *Should Trees Have Standing? Towards Legal Rights for Natural Objects*, 1974.

53. In the prevailing technical legal understanding too, a "regular linkage" between legal person and particular types of association is admitted, without, however, this putting the technical legal conception in question; e.g. Westermann, *Vertragsfreiheit und Typengesetzlichkeit im Recht der Personengesellschaften*, 1970, 7ff.; Staudinger-Coing, *Einl. ss 21ff.*, 6. By contrast, e.g. Wieacker (fn. 17) 359f. and Ott (fn. 3) 50ff., 69ff. take this "regular linkage" as a basis for more precise treatment of the connection between social structure and legal structure.

54. Flume (fn. 19) 25. Similarly also Martin Wolff, *On the Nature of Legal Persons*, *Law Quarterly Review* 54 (1938) 494ff., 506: "lawyers as a rule have no concern with the structural differences underlying the various kinds of legal persons, as that is a question of sociology". Cf. also Staudinger-Coing, *Einleitung zu ss 21-89*, 17.

55. The difficulties that authors that argue in "personal law" terms have with institution and foundation make the advantages of thinking in systemic categories (system of action, collectivity) clear. Gierke's difficulties with institution and foundation are notorious: cf. Gierke (fn. 30) 9ff. Interesting on this is Nobel, *Anstalt und Unternehmen*, 1975, 174ff. But Rittner and Flume have their problems too; Rittner 9fn. 16) 232ff. with the personal element so highly rated by him, without which the "spirit freezes"; Flume (fn. 19) 29f., with the limits of the legal person, since because of his over-concrete understanding of "social phenomena" he is forced to define

individuals and special assets of the legal person as "belonging" to it. On the relationship between the firm and institution, there are penetrating analyses in Nobel, loc. cit.

56. This observation and the following ones are oversimplified to the extent that they take it that the legal system is "building upon" particular social structures. For the moment, they leave socio-legal interactions out of account. In reality, of course, social capacity for action is regularly partly constituted through legal norms, indeed sometimes "artificially" created by the law alone.

57. Luhmann (fn. 41) 33; idem. (fn. 31) 271; cf. Parsons/Smelser (fn. 46) 15; Popitz, *Prozesse der Machtbildung*, 1968; Moore, *Legal Liability and Evolutionary Interpretation: Some Aspects of Strict Liability, Self-help and Collective Responsibility*, in: Gluckman, *The Allocation of Responsibility*, 1972, 51ff.; Coleman, *Loss of Power*, *American Sociological Review* 38 (1973), 1ff.; idem. (fn. 10); Vanberg (fn. 10).

58. This seems to be the prevailing trend, and not only in Germany: see the collective volume Bastid/David/Luchaire, *La personnalité morale et ses limites*, 1960, with country by country reports; Fletcher, *Cyclopedia Corporations*, 1974, I, 92ff.; for the U.S.A. recently Fabritius, *Parent and Subsidiary Corporations under U.S. Law - A Functional Analysis of Disregard-Criteria*, *EUI Working Paper* 1986. A critique of this trend can be found in Flume (fn. 19) 24f.

59. Williamson (fn. 9); Coleman (fn. 10); Vanberg (fn. 10).

60. Raiser (fn. 37) 166ff.

61. Luhmann (fn. 31) 270ff.

62. Blackstone, *Commentaries on the Law of England*, 1771, 467ff.

63. On this, using the construction of the hypercycle, see Teubner (fn. 12). On second-order autopoiesis cf. Maturana, *Erkennen: Die Organisation und Verkoerperung von Wirklichkeit*, 1982, 37, 211ff.; Mossakowski/Nettmann, *Is There a Linear Hierarchy of Biological Systems?* in: Roth/Schwiegler, *Self-Organizing Systems*, 1981, 39ff.; Jessop, *Relative Autonomy and Autopoiesis in Economy, Law and State*, in: Teubner, *Autopoietic Law*, 1987.

64. On the symmetry of closure and openness in autopoietic systems see in particular Varela, *Autonomy and Autopoiesis*, in: Roth/Schwiegler, *Self-Organizing Systems*, 1981, 14ff.; ibid., *L'auto-organisation: de l'apparence au mécanisme*, in Dumouchel/Dupuy, *L'auto-organisation*, 1983, 147ff.; Luhmann (fn. 31) *passim*; Gomez/Probst, *Organisationelle Geschlossenheit im Management sozialer Institutionen*, *Delfin* 5 (1985), 22ff.; Teubner, *Gesellschaftsordnung durch Gesetzgebungslaerm?* *EUI Working Paper* 86/207; Dupuy, *On the Supposed Closure of*

Normative Systems, in: Teubner, *Autopoietic Law*, 1987. Zolo, *Autopoiesis: Un paradigma conservatore*, *MicroMega* I (1986) 129ff.

65. Cf. Kuebler, *Verrechtlichung von Unternehmensstrukturen*, in: *idem.*, *Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidaritaet*, 1984, 214ff.; Teubner (fn. 5); *idem.*, *Unternehmensinteresse - das gesellschaftliche Interesse des Unternehmens "an sich"?* *ZHR* 149 (1985) 470.

66. Mayntz, *Politische Steuerung und gesellschaftliche Steuerungsprobleme*, manuscript 1986, 20ff.

67. On this recently Kreutz, *Von der Einmann- zur "Keinmann"-GmbH?* *FS Stimpel*, 1985, 379ff.; for a comparative view, Ziebe, *Der Erwerb eigener Aktien und eigener GmbH-Geschaeftsanteile in den Staaten der europaeischen Gemeinschaft*, 1981. On the debate in the U.S. cf. Dan-Cohen (fn. 3) 41ff.; "The Story of the Personless Corporation".

68. For a recent systematic approach to membership see Lutter, *Theorie der Mitgliedschaft*, *AcP* 180, 84ff.; on the concept of 'corporate body' (*Organ*), the absence of a theory is generally bewailed, see e.g. Coing, *FS Fischer*, 1979, 65f.; Wiedemann (fn. 33) 1980, 212ff. For the present situation see e.g. Ulmer, *Zur Haftung der abordnenden Koerperschaft nach ss 31 BGB fuer Sorgfaltsverstoesse des von ihr benannten Aufsichtsratsmitglieds*, in *FS Stimpel*, 1985, 705ff.

69. Wilhelm (fn. 2); interesting suggestions in Schanze, *Einmangengesellschaft und Durchgriffshaftung*, 1975, 102ff.

70. Ambitious formulations can be found in Baelz, *Einheit und Vielheit im Konzern*, *FS L. Raiser*, 1974, 287ff.; *Groups of Companies - the German Approach: "Unternehmen" versus "Konzern"*, *EUI Working Paper* 85/185.

71. Flume, *Die Personengesellschaft*, 1977, 1ff.; Ulmer, *Die Lehre von der fehlerhaften Gesellschaft*, in *FS Flume*, 1978, 301ff.; for a (constructive) criticism see Teubner, *Alternativkommentar BGB*, vor ss 705ff., 16ff.; a tempting systematization in Baelz, *Treuhandkommanditist, Treuhaender der Kommanditisten und Anlegerschutz*, *ZGR* 1980, 1ff., 37ff.

72. The economic aspects of a legal concept of the firm are stressed by Koehler, *Rechtsform und Unternehmensverfassung*, *ZgStw* 115 (1959), 721ff.; Ballerstedt, *GmbH-Reform, Mitbestimmung und Unternehmensrecht*, *ZHR* 135 (1971), 184; Rittner (fn. 16) 282ff.; Wiedemann (fn. 33) 1980, 307ff.; Flume (fn. 19) 48ff.

The aspect of a social association is stressed by Fechner, *Die Treubindungen des Aktionaers*, 1943, 64ff.; Duden, *Zur Methode der Entwicklung des Gesellschaftsrechts zum Unternehmensrecht*, in *FS Schilling* 1973, 309; Kunze, *Unternehmen*

und Gesellschaft, ZHR 147 (1983) 166ff.; Steinmann/Gerum, Reform der Unternehmensverfassung, 1978; Steinmann, The Enterprise as a Political System, in: Hopt/Teubner, Corporate Governance, 1985, 401ff.

The organization-theory perspective is stressed by Raiser (fn. 37) 166ff.; Baelz (fn. 70) 1974, 293ff.; Ott (fn. 3); Brinkmann, Unternehmensinteresse und Unternehmensrechtsstruktur, 1983; Teubner (fn. 5 and fn. 65); parallel approaches in the U.S. are in Selznick, Law, Society and Industrial Justice, 1969; Stone, Where the Law Ends, 1975; Dan-Cohen (fn. 3) 1986.

73. Raiser (fn. 37) 166ff.; *idem.*, Die Zukunft des Unternehmensrechts, in FS Fischer, 1979, 561ff., 572ff.; *idem.*, Die Theorie des Unternehmensrechts in Westdeutschland, 1985; kritisch die h.L.: Ballerstedt, ZHR 134 (1970), 251ff.; Brecher, AcP 171 (1971) 378ff.; Martens RdA 1972, 269ff.; Rittner (fn. 16) 306f.; Wiedemann (fn. 33) 1980, 308f.

74. A suitable formulation by Wiedemann, Grundfragen der Unternehmensverfassung ZGR 1975, 402.

75. Rittner (fn. 16) 283ff., 288.

76. Flume (fn. 19) 48.

77. Loc. cit.

78. Beseler, System des gemeinen deutschen Privatrechts I, 1847, 236; Saleilles, De la personnalité juridique, 1922, 354; H.J. Wolff (fn. 13) 63f.; Flume (fn. 19) 13.

79. Hofstadter, Goedel, Escher, Bach: An Eternal Golden Braid, 1979, esp. 692ff. About the connections between self reference and paradox in law see Fletcher, Paradoxes in Legal Thought, Columbia Law Review 85 (1985) 1263ff.

80. H..H. Wolff (fn. 13) 69, with other references.

81. Clear in e.g. Rittner (fn. 16) 232ff., 283ff.

82. For example see fn. 31 and 64. Scepticism about the whole trend comes from (German) 3344; see also Teubner's reply, Muenchhausenjurisprudenz, loc. cit. 350 and Hejl, Autopoesis- und es das sein? loc. cit. 357.

83. This can be read as the attempt to clarify the (confusing) definition of Ott (fn. 3) 52: "legal person and corporate structure, legal person and corporation, coincide", which has frequently been criticised e.g. Staudinger-Coing, Einl. ss 21 ff., 18; MK-Reuter, vor s 21, 5ff. Of course the expression "corporate" is misleading here, and "coincide" should be replaced by the formulation "are in self-referential relationship to the self-description as collectivity". How often

the difficulty arises here of choosing between precision and comprehensibility in the formulation.

84. This anticipated criticism is based on Flume (fn. 19) 47f.

85. Raiser (fn. 73) 1979, 565.

86. Raiser (fn. 37) 168; *idem.* (fn. 73) 1979, 565; *idem.*, Unternehmensziele und Unternehmensbegriff, ZHR 144 (1980) 231.

87. Raiser (fn. 36) 138ff.

88. This is Savigny's great achievement, which however is continually negated by the attempt to "internalize" the membership structure in the legal person: Savigny, System des heutigen roemischen Rechts II, 1840, 283ff., 332.

89. Only to modify it again later, Flume (fn. 19) 28ff., when he stresses the "involvement" of the members.

90. Savigny (fn. 88) 347.

91. Flume (fn. 19) 48f.

92. Cf. also the criticism by John, Personrecht und Verbandsrecht im Allgemeinen Teil des Buergerlichen Rechts, AcP 185 (1985) 209ff., 220ff.; Raiser, AcP 181 (1981) 245ff.

93. Flume, Um ein neues Unternehmensrecht, 1980.

94. Flume (fn. 19) 49.

95. Rittner (fn. 16) 255.

96. See Teubner, Der Beirat zwischen Verbandssouveraenitaet und Mitbestimmung, ZGR 1986.

97. Wiedemann (fn. 74) 402; *idem.*, (fn. 33) 1980, 309; Flume (fn. 19) 45.

98. Flume (fn. 19) 37ff.

99. Or - to exhaust the whole of the political spectrum - neo-Liberalism or neo-Conservatism; see e.g. Nahamowitz, "Reflexives Recht": Das unmoegliche Ideal eines postinterventionistischen Steuerungskonzepts, Zeitschrift fuer Rechtssoziologie 6 (1985) 29ff.

100. Teubner (fn. 5 and fn. 65).

101. A realistic assessment can be found in Simits, Zur Verrechtlichung der Arbeitsbeziehungen, in: Kuebler, Verrechtlichung, 1984, 73ff., 122ff. Again informative, albeit "critical", is Dittrich, Mitbestimmung- eine korporatistische Strategie? 1975.

102. Cf. Piore/Sabel (fn. 1); Strauss (fn. 6); Willman, *The Implications of Process and Product Innovations for Labour Relations*, 1985.

103. Streeck (fn. 1) 11.

104. Gutchess, *Employment Security in Action: Strategies that Work*, 1985; Streeck (fn. 1) 18ff., 27ff.

105. A stimulating comparison between contractual and organizational solutions to the flexibility problem can be found in Streeck (fn. 1) 14ff. On this cf. the "classical" formulation in Selznick (fn. 30), 54ff.

106. Krause, *From Old to New Monism: An Approach to an Economic Theory of the "constitution" of the Firm*, in: Daintith/Teubner, *Contract and Organisation*, 1986, 219ff., 225.

107. On this cf. the interpretation of the empirical material in Hopt, *New Ways of Corporate Governance*, *Michigan Law Review* 82 (1984); Streeck, *Co-determination: The Fourth Decade*, *International Yearbook of Organizational Democracy*, 1984; Krause, *Mitbestimmung und Effizienz*; *Sociologica Internationalis* 23 (1985) 148ff.; Teubner, *Industrial Democracy Through Law?* in: Daintith/Teubner, *Contract and Organisation* 1986, 261ff., 268ff.



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